In The

Supreme Court of the United States

October Term, 1967

No. 1016

WAYNE DARNELL BUMPER,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

RESPONDENT'S BRIEF

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Opinion Below

The opinion of the Supreme Court of the State of North Carolina is reported at 270 N.C. 521, 155 S.E. 2d 173.

Jurisdiction

The judgment of the Supreme Court of North Carolina was made and entered on July 24, 1967, and a copy thereof is set out in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented

1. Whether it is a denial of the petitioner's rights under the Fourteenth and Sixth Amendments to the Constitution of the United States in a state proceeding, when a state court denies a timely request by the defendant to disallow the prosecuting attorney's challenges of prospective jurors for

cause on the ground that they are opposed to capital punishment, inasmuch as such disallowance of such challenges would result in a biased jury incapable of rendering verdicts authorized by statute.

2. Whether it is a denial of the defendant's rights under the Fourteenth and Fourth Amendments to the Constitution of the United States in a state proceeding to introduce in evidence the crime weapon seized upon a search, inasmuch as such search was voluntarily consented to by the owner of the weapon and the person in charge of the premises, *or*, if such search was not consented to, inasmuch as the weapon did not belong to the petitioner and was not found in the petitioner's room, and the petitioner was not present at the time of the search.

Constitutional Provisions Involved

Constitution of the United States:

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurdisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

SUMMARY OF THE ARGUMENT

I.

THE STATE OF NORTH CAROLINA DID NOT DENY THE PETITIONER EQUAL PROTECTION OF THE LAWS AND DUE PROCESS OF LAW AND THE RIGHT OF TRIAL BY IMPARTIAL JURY WHEN PROSPECTIVE JURORS WERE EXCUSED AT HIS TRIAL BECAUSE OF CONSCIENTIOUS SCRUPLES AGAINST CAPITAL PUNISHMENT.

A. EXCLUSION FROM A JURY IN A CAPITAL CASE OF PERSONS HAVING CONSCIENTIOUS SCRUPLES AGAINST THE DEATH PENALTY IS CONSTITUTIONALLY PERMISSIBLE AND NECESSARY TO SECURE A FAIR TRIAL AND PROTECT THE STATE'S INTEREST.

This practice has been approved over a period of many years by an overwhelming majority of state courts and a number of federal courts as being a reasonable practice to avoid a biased jury which could not be fair to the State. The right to have a jury drawn from a representative cross-section of the community does not entitle an accused to a prejudiced jury.

B. THERE IS NO RELIABLE BODY OF EVIDENCE TO

SUPPORT THE ASSERTION THAT PERSONS WHO DO NOT HAVE CONSCIENTIOUS SCRUPLES AGAINST THE DEATH PENALTY ARE BIASED BY REASON OF BEING "CONVICTION PRONE".

The studies, upon which is based the contention that jurors who are not opposed to capital punishment are conviction prone, are few in number, small in scope, fragmentary and are highly inconclusive and insufficient to support the proposition urged by the petitioner.

II.

THE PETITIONER'S RIGHTS UNDER THE FOURTEENTH AND FOURTH AMENDMENTS WERE NOT VIOLATED BY INTRODUCING A RIFLE IN EVIDENCE AT HIS TRIAL BECAUSE THE SEARCH WAS LAWFUL AND BECAUSE, EVEN IF UNLAWFUL AS TO THE OWNER OF THE RIFLE AND THE PREMISES SEARCHED, THERE WAS NO INVASION OF THE RIGHT OF PRIVACY OF THE PETITIONER WHO WAS NOT PRESENT AT THE SEARCH.

A. THERE WAS VOLUNTARY CONSENT BY THE PETITIONER'S GRANDMOTHER THAT OFFICERS SEARCH THE GRANDMOTHER'S HOME.

The evidence shows clearly that the consent was not predicated merely upon belief in the existence of a valid search warrant but that the grandmother consented because she did not care and she did not think any evidence of any crime would be discovered.

B. THE PETITIONER HAS NO STANDING TO COMPLAIN OF THE SEARCH OF HIS GRANDMOTHER'S PREMISES AND THE SEIZURE OF HIS GRANDMOTHER'S RIFLE.

There was no invasion of petitioner's right of privacy which is protected by the Fourteenth and Fourth Amend-

ments. He did not own or claim a right to the seized article; he did not own or lease the premises where the article was discovered; his right in the premises consisted of his being a member of his grandmother's household; the article was not found in his bedroom or any place where he had attempted to conceal it; it belonged to his grandmother and was found in the usual place where the grandmother kept it; and he was not present at the time of the search.

Argument

I.

The State of North Carolina Did Not Deny the Petitioner Equal Protection of the Laws and Due Process of Law and the Right of Trial by Impartial Jury When Prospective Jurors Were Excused at His Trial Because of Conscientious Scruples Against Capital Punishment.

A. EXCLUSION FROM A JURY IN A CAPITAL CASE OF PERSONS HAVING CONSCIENTIOUS SCRUPLES AGAINST THE DEATH PENALTY IS CONSTITUTIONALLY PERMISSIBLE AND NECESSARY TO SECURE A FAIR TRIAL AND PROTECT THE STATE'S INTEREST.

The authority and right of the State to exact the death penalty would and could be nullified by a single biased, opinionated juror who has conscientious scruples against imposition of the death penalty.

This is obviously true if such a juror sits on a jury that determines both guilt and punishment.

It is obviously true if he sits on a jury which only determines punishment.

It is obviously also true if he sits on a jury which determines only guilt and not punishment because the same conscientious scruples against the death penalty can operate

on him as a member of the trial of guilt jury as to prevent any subsequent punishment jury from having an opportunity to impose the death penalty.

In STATE v. CHILDS, 269 N. C. 307, at 317, 152 S. E. 2d 453 (1967), PARKER, C. J., briefly described the decisions in State and federal courts, with quotations to indicate their rationale, on the question of allowance of challenge for cause of a juror who has scruples against capital punishment, writing as follows:

"Defendant assigns as errors many rulings of the trial judge granting the State's peremptory challenge for cause of a prospective juror on the *voir dire* because the prospective juror had conscientious scruples against the infliction of the death penalty by the State. These assignments of error are overruled.

"It is a general rule that the State in the trial of crimes punishable by death has the right to an impartial jury, and in order to secure it, has the right to challenge for cause any prospective juror who is shown to entertain beliefs regarding capital punishment which would be calculated to prevent him from joining in any verdict carrying the death penalty. *S. v. Arnold,* 258 N.C. 563, 129 S.E. 2d 229; *S. v. Vann,* 162 N.C. 534, 77 S.E. 295; *S. v. Vick,* 132 N.C. 995, 43 S.E. 626; *S. v. Bowman,* 80 N.C. 432; Annot., 48 A.L.R. 2d 563. The annotation in A.L.R. 2d cites in support of this general rule cases from 35 states (including North Carolina) and from the United States courts. In accord, 4 A.L.R. 2d, Later Case Service, p. 1273, and supplement.

"In *Turberville v. United States,* 303 F. 2d 411, cert. den. 307 U. S. 946, 8 L. Ed. 2d 813, the Court held that the trial court's action in excusing for cause on *voir dire* veniremen who answered affirmatively questions as to whether they were opposed to capital punishment was not in error. The Court, in a scholarly discussion of the question, said in part:

" 'Opposition to capital punishment may be for any

one of a variety of reasons. They range from an unshakable religious conviction as stark as the Old Testament Commandment to a mere intellectual or philosophical distaste. Not all "opposition" to this penalty creates incompetence for jury service. So not all who are "opposed" to captial punishment are necessarily unqualified for service in a capital case. The nub of disqualification on this ground is whether the opposition is of such nature as to preclude an impartial judgment on the facts and the law of the case to be tried.

"' . . . What Simpson is really asserting is the right to have on the jury some who may be prejudiced in his favor—*i.e.*, some who are opposed to one possible penalty with which he is faced. We think he has no such constitutional right. His right is to absolute impartiality.'

"The whole subject here under consideration was thoroughly explored in an exhaustive, scholarly opinion by Circuit Judge Hincks writing for a unanimous Second Circuit in *United States v. Puff*, 211 F. 2d. 171, cert. den. 347 U.S. 963, 98 L. Ed. 1106. We refer to the *Puff* case and rely upon it.

"Defendant contends that we should reconsider our decisions that in a prosecution for a capital felony the State is entitled to challenge for cause any prospective juror who has conscientious scruples or beliefs against the infliction of the death penalty by the State, for the following reasons: That he is entitled to a 'balanced' jury, composed of jurors who believe in capital punishment and those who do not; that jurors who believe in capital punishment are more prone to convict than those who do not so believe; and that to exclude jurors who do not believe in capital punishment denied him a fair and impartial jury from a cross-section of the community. These contentions have been refuted in *United States v. Puff, supra,* which case holds, *inter alia,* as stated in the eleventh and twelfth headnotes to this case:

"'11. Under statute providing for prosecution of murder in first degree and making death penalty manda-

tory, upon conviction, unless jury recommends life imprisonment, a verdict must be unanimous both as to guilt and as to punishment. 18 U.S.C.A. § 1111.

" '12. In prosecution for murder under statute making death penalty mandatory unless jury should recommend life imprisonment, defendant was not entitled to a balanced jury in the sense of including jurors who held scruples against imposition of death penalty. 18 U.S.C.A. § 1111.'

"In its opinion the Court said:

" 'It will readily be seen that this "balanced" jury, which the defendant envisages is in reality a "partisan jury"; if, as he urges, it may include jurors with bias or scruples against capital punishment it must—if it is to have "balance"—include also those with bias in favor of the death penalty as the punishment for murder. It is settled by *Andres v. United States*, 333 U.S. 740, 68 S. Ct. 880, 92 L. Ed. 1055, that under the Statute the verdict must be unanimous both as to guilt and as to punishment. As a result, as Mr. Justice Frankfurter noted in his concurring opinion, 333 U.S. at page 766, 68 S. Ct. at page 892, any juror "can hang the jury if he cannot have his way" as to the sentence which *he* deems appropriate. These considerations lead to the conclusion that trials before "balanced juries," even on unanimous findings of guilt, would frequently result in disagreements. And disagreements on successive trials would result in practical immunity from murder. We cannot believe that the Statute was intended to have such a tendency.'

"This is said in Annot., 48 A.L.R. 2d, p. 563:

" ' Upon the theory that conscientious scruples against infliction of the death penalty under any circumstances, or equivalent beliefs, equally disqualify a juror for cause in a prosecution for a capital crime, whether the law prescribes the single punishment of death upon convic-

> tion, or invests the jury, upon conviction, with a discretionary power to assess death or life imprisonment according to the evidence and circumstances, the rule has become generally accepted that where the jury is vested with such discretion the state may challenge for such cause because it is entitled to the maximum penalty if the proof shall justify it, and to contend throughout the trial and finally to the jury that the character of the crime justifies it.' "

In UNITED STATES v. Puff, 211 F. 2d 171, at 184, the following is stated:

"In Gillars v. United States, 87 U.S. App. D.C. 16, 182 F. 2d 962, 980, a juror had been asked on *voir dire* whether she was 'opposed to the death penalty'. It was held that her reply that 'she was opposed to the death penalty and did not believe she could render a fair and impartial verdict in the case' was a disclosure of a disqualification requiring excuse for cause, and the question asked was not held to be improper.

"And in Stroud v. United States, 251 U.S. at page 380, 40 S. Ct. 176, 64 L. Ed. 317, it was held that a juror should be excused for cause if from his preliminary examination it is 'reasonably certain that in the event of conviction for murder in the first degree he would render no other verdict than one which required capital punishment.' If jurors with bias *in favor* of capital punishment are disqualified, certainly jurors with bias *against* the death penalty should be similarly disqualified. Any holding to the contrary would make not for 'balanced juries' but rather for lop-sided juries.

"Turning to an examination of the cases in the state courts on the point, we find at least three cases in which the defendants made the very argument advanced here, *viz.*, that the modification of a statute under which the death penalty was mandatory by provision of an alternative punishment by imprisonment with power in the jury to decide between the two alternatives, impliedly repealed the disqualification

for scruples against capital punishment which had theretofore existed. But in each, the courts held otherwise. State v. Owen, 1953, 73 Idaho 394, 253 P. 2d 203; Rhea v. State, 1902, 63 Neb. 461, 88 N.W. 789; State v. Riley, 1923, 126 Wash. 256, 218 P. 238. And in many other states having statutes similar to the Federal Statutes of 1897 it has been held that scruples against capital punishment are a disqualification. Demato v. People, 1910, 49 Colo. 147, 111 P. 703, 35 L.R.A., N.S., 621; Gross v. State, 1850, 2 Ind. 329; Price v. State, 1930, 159 Md. 491, 151 A. 408; Borowitz v. State, 1917, 115 Miss. 47, 75 So. 761; State v. Wooley, 1908, 215 Mo. 620, 115 S.W. 417; State v. Juliano, 1927, 103 N.J.L. 663, 138 A. 575; Commonwealth v. Bentley, 1926, 287 Pa. 539, 135 A. 310. It is perhaps worth noting that in Commonwealth v. Bentley, the court cited the rule of Logan v. United States, supra, [Logan v. United States, 1892, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429] decided prior to the 1897 Statute, as applicable under a state statute substantially the same as the 1897 Statute. For other cases in states which have similar statutes in which the disqualification exists under sanction of statute, see the following: Leigh v. Territory, 1906, 10 Ariz. 129, 85 P. 948; People v. Rollins, 1919, 179 Cal. 793, 179 P. 209; Smith v. State, 1911, 5 Okl. Cr. 282, 114 P. 350; Gonzales v. State, 1893, 31 Tex. Cr. R. 508, 21 S.W. 253, 254; State v. Greer, 1883, 22 W. Va. 800; State v. Melvin, 1856, 11 La. Ann. 535.

"So far as we are aware, the only states in which there are decisions to the contrary are Iowa and South Dakota. See State v. Lee, 1894, 91 Iowa 499, 60 N.W. 119; State v. Wilson, 234 Iowa 60, 11 N.W. 2d 737; and State v. Garrington, 1898, 11 S.D. 178, 76 N.W. 326.

"It will be noted that all the cases above cited stem from the fundamental theory that the American jury should be composed of impartial jurors. As a result, a party is entitled to an array of impartial jurors to which he may direct his peremptory challenges. To this a party is entitled as of right. But granted this, a party is entitled to no more. Having no legal right to a jury which includes those because of scruple or bias he thinks might favor his cause, he suffers no prejudice if jurors, even without sufficient cause, are

excused by the judge. Only if a judge without justification overrules a challenge for cause and thus leaves on the panel a juror not impartial, does legal error occur. And often the failure of a party to exhaust his peremptory challenges is taken as convincing indication that, even if a talesman without sufficient justification had been excused for cause, at least those who were impanelled were indeed impartial."

Thus the overwhelming weight of authority of the decisions of State courts and federal courts is to the effect that the State in capital cases is entitled to exclude from jury service biased jurors who have conscientious objections to the death penalty, and no constitutional rights of an accused are infringed thereby.

B. THERE IS NO RELIABLE BODY OF EVIDENCE TO SUPPORT THE ASSERTION THAT PERSONS WHO DO NOT HAVE CONSCIENTIOUS SCRUPLES AGAINST THE DEATH PENALTY ARE BIASED BY REASON OF BEING "CONVICTION PRONE".

In the instant case the accused raped a young woman at gun point, shot both the woman and her companion with the announced intention of killing them, and left them for dead. The jury which convicted him recommended life imprisonment which made a sentence of life imprisonment mandatory.

In the face of the above, petitioner's counsel is contending that the defendant was not tried by a proper jury because the jury was made up of a "conviction prone" jury.

The petitioner argues that a person who does not have conscientious scruples against the death penalty is more likely in any given case to convict than a person who does have such scruples. Many disagreeable and unflattering traits and charactersitics are attributed to this juror who believes the death penalty may be appropriate under some circumstances for some murderers and rapists. Although the "studies" made in this field are few, and the number of

persons interviewed pitifully small and sometimes unrepresentative, there has been no hesitancy in basing wildly extravagant conclusions on them.

We are told that the so-called death-qualified juror, or the person who does not have conscientious scruples against the death penalty, is hostile, prosecution prone, an extremist, and an authoritarian. On page 25 of his brief, petitioner states with respect to "authoritarians":

"Authoritarians are dogmatic. Non-authoritarians are open-minded, libertarian. In the language of the psychologists, the authoritarian tends to be moralistic, extra-punitive, distrustful and suspicious, non love-seeking, exploitive, manipulative, and opportunistic. In contrast the non-authoritarian shows tendencies toward permissiveness, impunitiveness or intra-punitiveness, trustingness, equalitarianism, and love-seeking. The authoritarians are roughly divided into those with politically rightist attitudes and those with politically leftist attitudes.

"One would expect politically rightist authoritarians to favor the death penalty, and non-authoritarians (and politically leftist authoritarians) to have conscientious scruples against the death penalty. At the same time, the politically rightist authoritarian, who possesses the traits of punitiveness, distrustfulness, and suspicion would seem less inclined to accept the presumption of innocence of a criminal defendant, more inclined to believe the evidence of the state, and generally hostile to the defendant. On the other hand, the non-authoritarian, with a predisposition against punishing others, and general attitudes of permissiveness, of trustingness, would seem to have less of a desire to convict, expectably would be more sympathetic to the defendant's side of the case, and in general would have an open and lenient attitude toward criminal defendants."

This is purely a side matter, but it is noted that it is asserted that politically rightist authoritarians favor the death penalty and politically leftist authoritarians do not.

If this line of reasoning is followed it can be understood that Mussolini and Hitler would be likely to favor capital punishment, but when did Stalin and Castro have conscientious scruples against the death penalty?

Others in discussing the attributes of the person without conscientious scruples have described such a juror as being an unrepresentative subgroup of the community, punitive, arbitrary, autocratic and unenlightened. Such a juror has been called partial and biased while scrupled jurors are said to have greater humanity, compassion, impunitiveness and objectivity. Petitioner has not used all the above descriptive phrases, but they have been used by others who have joined in advocating the same thesis.

It is submitted that there is no evidence available which could be said to give any substantial support to petitioner's contention.

It is conceded that in recent times public or popular polls of selected persons have yielded highly accurate guesses as to personal attitudes. In the instant case, however, we are confronted at the outstart with a paucity of studies in the field and with the fact that an exceedingly small number of persons have been interviewed in all the studies combined.

In the Goldberg study (App. 73-77), the persons interviewed were a mere 200 college students.

In the Wilson study (App. 78-80), a mere 200 persons were interviewed and, again, they were mostly college students.

In the Zeisel study, referred to in petitioner's brief, pp. 29-30, which study apparently is unpublished, and on file at the University of Chicago Law School, a number of jurors (approximately 1,248) were interviewed.

In the Crosson study, referred to in petitioner's brief, a total of 72 persons, who had served on juries, were interviewed.

There may have been other studies made in this field but, if so, respondent's counsel is not familiar with them and petitioner's counsel does not cite them. Surely no serious contention can be made that an accurate and valid conclusion can be drawn as to the psychological and sociological attitudes and predilections of 200,000,000 people—or so many of them as are of jury age—on the basis of a few scattered studies of a total of little more than 1700, at least 400 of whom were specialized groups (college students) and probably in many instances under jury service age.

II

THE PETITIONER'S RIGHTS UNDER THE FOURTEENTH AND FOURTH AMENDMENTS WERE NOT VIOLATED BY INTRODUCING A RIFLE IN EVIDENCE AT HIS TRIAL BECAUSE THE SEARCH WAS LAWFUL AND BECAUSE, EVEN IF UNLAWFUL AS TO THE OWNER OF THE RIFLE AND THE PREMISES SEARCHED, THERE WAS NO INVASION OF THE RIGHT OF PRIVACY OF THE PETITIONER WHO WAS NOT PRESENT AT THE SEARCH.

A. THERE WAS VOLUNTARY CONSENT BY THE PETITIONER'S GRANDMOTHER THAT OFFICERS SEARCH THE GRANDMOTHER'S HOME.

A description of the evidence relating to the question of consent to the search is well set out by PLESS, J., in the opinion below, and the reasons of the North Carolina court supporting the conclusion that the search was voluntarily consented to, are succintly summarized as follows: (Appendix pp. 87-90)

"The defendant complains of the search of his grandmother's house which resulted in finding a rifle that has been identified as the one which fired the shots into the bodies of Mrs. Nelson and Monty Jones. But it must be remembered (1) that his premises were not searched—they were his grandmother's; (2) *his* rifle was not taken

—it was his grandmother's; (3) *she* gave permission for the search and has not yet complained of it. Since the Solicitor announced that he was not relying upon the search warrant but upon permission given by the owner of the premises for its search, the question arises as to whether her consent was voluntarily given. While there are decisions that the presence of officers and the announcement (fol. 133) that they wish to search premises constitutes a condition in whch coercion and intimidation may be present, they are not applicable here.

"The defendant sought an order of the Court requiring the State to return the rifle and to suppress evidence regarding it. In support of the motion they offered the affidavit of Mrs. Hattie Leath in which she said: 'On Tuesday, August 2, 1966, at about 2:00 P.M., four white men drove up to her house in two cars. She knew these men to be officers of the Alamance County Sheriff's Department, although they were not in uniform . . . One of the deputies came up on the porch of her house and walked up to the front screened door. She was standing immediately inside the door. The deputy said he had a notice or a warrant or something like that, for searching her house. He did not appear to have any paper in his hand, and he did not read anything to her. After hearing this, she did not stop to think about whether the officers had a right to search her house. She simply answered the officer right away by saying, "Go ahead," as she opened the door and stepped out onto the porch. The officers began at once to search the house.'

"During the trial the State offered the rifle which was found in the house, and upon objection to its admission, the Court excused the jury, and Mrs. Leath testified in person. Some of her statements are quoted as follows (the underscoring is ours): 'I own my own house; it belongs to me . . . the defendant Wayne Darnell Bumpers was living with me on that date . . . He has been living with me at this place all of his life . . . Sheriff Stockard came out to my home . . . Four of them came. I was busy about my

work, and they walked up and said, "I have a search warrant to search your house," and I walked out and *told them to come on in* . . . I just told him to come on in and go ahead and search, and I went on about my work. I wasn't concerned what he was about. I was just satisfied . . . I told Mr. Stockard to go ahead and look all over the house. I had no objection to them making a search of my house. I was willing to let them look in any room or drawer in my house they wanted to. Nobody threatened me with anything . . . I let them search, and it was *all my own free will.* Nobody forced me at all.' She also said, 'I did have a .22-caliber Remington, single-shot rifle at my house on July 31. Most of the time it stayed inside the wardrobe and then behind the door, out from the living room. This is my rifle . . . I have owned it since my husband bought it'

"It is to be noted that the rifle was not found in the defendant's private room, nor in any part of the house assigned to him, but 'inside the wardrobe, or behind the door.' (fol. 134) Following Mrs. Leath's testimony, the following entry was made by the Court:

> "'The Court: The Court finds that from the evidence of Mrs. Hattie Leath that it is of a clear and convincing nature that she, the said Mrs. Hattie Leath, voluntarily consented to the search of her premises, as is more particularly set forth in her evidence, and that that consent was specifically given and is not the result of coercion from the officers. Motion Denied for suppression of the evidence with reference to the .22-caliber rifle, marked State's Exhibit No. 2.'

"We know no better way to establish that one's actions were voluntary than by the statement and attitude of the person concerned. No interpretation can be placed upon Mrs. Leath's testimony that would sustain any claim of coercion or pressure or intimidation. The defendant cites *Mapp v. Ohio,* 367 U.S. 643 (1961), and we have also had called to our attention the very recent case of *Maryland Penitentiary v. Hayden,* decided by the U. S. Supreme Court

29 May 1967 [87 S. Ct. 1642, 387 U. S. 294]. Upon consideration of them, we find them inapplicable here. Rather, the terse statement of Denny, J., later C. J., speaking for the Court in *State v. Moore,* 240 N. C. 749, 83 S.E. 2d 912, is controlling:

> " 'The first question posed is whether a search warrant was required to search the premises of the defendant if he consented to the search. The answer is no. It is generally held that the owner or occupant of premises, or the one in charge thereof, may consent to a search of such premises and such consent will render competent evidence thus obtained. Consent to the search dispenses with the necessity of a search warrant altogether . . . . The second question is whether the defendant consented for the officers to search his premises . . . The Court found as a fact that the defendant, at the request of the officers, voluntarily gave them permission to search his premises . . . the ruling of a trial judge on a *voir dire,* as to the competency or incompetency of evidence (adduced upon the search), will not be disturbed if supported by any competent evidence.' "

Granting that whether consent to a search is voluntary presents a mixed question of fact and law, the important and conclusive evidence are the words of Mrs. Leath included in the quotation above from the court's opinion:

> " . . . I wasn't concerned what he was about. I was just satisfied . . . I told Mr. Stockard to go ahead and look all over the house. I had no objection to them making a search of my house. I was willing to let them look in any room or drawer in my house they wanted to. Nobody threatened me with anything . . . I let them search, and it was *all my own free will.* Nobody forced me at all."

The respondent urges that the evidence was ample to support the trial court's finding that the search was voluntary.

B. THE PETITIONER HAS NO STANDING TO COMPLAIN OF THE SEARCH OF HIS GRANDMOTHER'S PREMISES AND THE SEIZURE OF HIS GRANDMOTHER'S RIFLE.

The home in which the rifle in question was seized was the home of Mrs. Hattie Leath. One son and two grandchildren lived with her and the petitioner, who was nineteen years old, was one of the grandchildren.

Mrs. Leath testified that, "Most of the time it [the rifle] stayed inside the wardrobe and then behind the door, out from the living room. This is my rifle." (App. p. 46) Apparently, this is consistent with the testimony of the State's witness as follows: (App. p. 52)

> "This rifle was in the kitchen, back side of the house, sitting behind the kitchen door as you come in the front door, go to a hall and the kitchen. I took that rifle in my possession at that time. I took the rifle to Raleigh to our lab."

This brings us directly to the question of whether we have here a situation where the right of privacy of the petitioner was unconstitutionally infringed. To summarize briefly the pertinent factual aspects, the place searched was the home of the grandmother of the petitioner. Petitioner lived in this home with his grandmother. The crime weapon, a rifle, which was seized was not the property of the petitioner. The rifle was not found in the bedroom or other portion of the house, but in the kitchen. There is no evidence that the petitioner was present at the time of the search and the implication seems to be that he was not present.

> ". . . [T]herefore, . . . one may not object to an illegal or unreasonable search of the property, premises, or possessions of another, if his own privacy is not unlawfully invaded." 79 C.J.S. 812, *et seq.*

In an attempt to analyze this situation and determine the

proper applicability of the relevant court decisions, a number of cases have been studied, particularly JONES v. UNITED STATES, 362 U. S. 257, 261, 80 S. Ct. 725, 731, 4 L. Ed. 2d 697 (1960); UNITED STATES v. BOZZA, 365 F. 2d 206 (2d Circ. 1966); and UNITED STATES v. MANCUSI, 379 F. 2d 897 (2d Circ. 1967)

The property seized was not the property of the petitioner. It is realized that, because of the dilemma presented an accused when contraband property is involved, it is no longer necessary or essential that an accused either own or allege ownership or a possessory interest in the property seized. However, it is pointed out here for such bearing as it may have that the weapon in question did not belong to the petitioner before it was used in the commission of the crime and that, after the commission of the crime he, or someone, had apparently returned the rifle to the usual place where the grandmother owner of the rifle usually kept it in her house, namely, behind a door, in the kitchen or off the hall. When the rifle was returned to its usual resting place, where the grandmother habitually kept it, it would appear that the petitioner had surrendered any rights he might theretofore have had with respect to a search for the rifle at any place other than perhaps the room assigned to him.

It has been said that if the search was *directed at* a defendant, then he has standing to object to the search of any premises where he is lawfully entitled to be, apparently, provided he was physically present at the time the search was made. It must be admitted that, in one sense, the search was certainly directed at the defendant since he was the suspect, and not the grandmother, but in a purely physical sense, the search and seizure was directed against the grandmother's house and the grandmother's rifle.

The following in UNITED STATES v. BOZZA, *supra,* at 222-223, is apropos:

"The Supreme Court's most recent comprehensive statement on the subject of 'standing' to invoke the rule exclud-

ing real evidence obtained by illegal search and seizure is Jones v. United States, 362 U.S. 257, 261, 80 S. Ct. 725, 731, 4 L. Ed. 2d 697 (1960). The Court there said, through Mr. Justice Frankfurter:

> " 'In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41 (e) applies the general principle that a party will not be heard to claim a constitutional protection unless he "belongs to the class for whose sake the constitutional protection is given." Hatch v. Reardon, 204 U.S. 152, 160 [27 S. Ct. 188, 190, 51 L. Ed. 415]. The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy.'

"Consistent with that view the Court has held that a defendant has standing to object not only to a search of premises owned or leased by him but also to the search of premises where he was present by consent of the owner or possessor, Jones v. United States, supra, 362, U.S. at 265-267, 80 S. Ct. 725; to the seizure of property for the illegal possession of which he is charged, Jones v. United States, supra, 362 U.S. at 263, 80 S. Ct. 725; and to the seizure of property owned or possessed by him and stored in the premises of another to which he had access, United States v. Jeffers, 342 U.S. 48, 72 S. Ct. 93, 96 L. Ed. 59 (1951). The instant case does not come within either the general language of the quoted passage or these specifications. The gun stolen from the Hillsdale Post Office remained the property

of the United States; the thieves abandoned its possession to Guzzo; none of them was present in Guzzo's home at the time of the search; and none was charged with an offense for mere possession of the gun."

In UNITED STATES v, MANCUSI, *supra,* at 904, the following is stated:

> "In United States v. Bozza, 365 F. 2d 206 (2d Cir. 1966), for example, the appellants had abandoned possession of a stolen gun to Guzzo, one of the members of the burglary ring. None of the appellants claimed any legitimate interest in the weapon; nor had any of them been present in Guzzo's home when the allegedly illegal search occurred. In those circumstances we denied standing stating that '[t]he values that the Fourth Amendment protects are sufficiently advanced by excluding the results of illegal searches and seizures at the behest of "victims" *in the broad sense the Supreme Court has given that term* * * *.' Id. at 223. (Emphasis added.)"

The State contends that at some stage along the way, a person's "privacy" ceases to exist so far as invoking the protection of the Fourth Amendment is concerned. There is a point reached when his "privacy" has become of such a shadowy, tenuous and insubstantial nature that its protection must give way to the need for the public's protection from murderers, robbers and rapists. Inasmuch as the defendant did not own or claim the rifle, or own or claim the home where the rifle was found although he had permission to live there, and was not present at the time of the search, there has not in this case been an invasion of the petitioner's privacy in such a sense as to violate the Fourth Amendment.

It is submitted that the facts of this case do not warrant a conclusion that the petitioner himself was the victim of an invasion of privacy.

Conclusion

The respondent respectfully prays that the judgment of the Supreme Court of North Carolina in this case be affirmed

for the reasons that (1) no constitutional rights of the petitioner were infringed by excluding from the jury persons with conscientious scruples against capital punishment, and (2) no constitutional rights of the petitioner with respect to searches and seizures were infringed by offering in evidence the crime weapon, which did not belong to the petitioner and which was seized in petitioner's grandmother's kitchen when petitioner was not present.

Respectfully submitted,

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